

costs to be paid out of income and accordingly I order that the costs of these proceedings be paid out of income.

Order accordingly.

Solicitors: *Laycock & Ong; de Souza & Christopher; Mallal & Namazie.*

R. SABAPATHY v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Smith and Syed Sheh Barakbah JJ.)
September 5, 1958]

[Penang — F. M. Criminal Application No. 1 of 1958]

Criminal Law and Procedure — Appeal to Court of Appeal — Courts Ordinance, 1948, s.34 — Interpretation — Question of extension of time.

A person wishing to appeal under section 34 of the Courts Ordinance, 1948 must obtain the necessary certificate and must then file it within 30 days or within such extended period as the Court of Appeal may allow. The Court of Appeal cannot consider any question of extension of time until it is known whether or not a certificate has been in fact obtained (or will be obtained in the event of an extension of time being granted).

CRIMINAL APPLICATION.

Thomson C.J.: — This applicant was tried in the Sessions Court at Kuala Trengganu for an offence in contravention of section 3(a) of the Prevention of Corruption Ordinance, 1950. He was acquitted and discharged. With the merits of the acquittal we are not here concerned.

The Public Prosecutor appealed and in the event the order of acquittal and discharge was set aside, a conviction was substituted for it and the applicant was sentenced to three months' imprisonment.

The position then was that the appellant had no further right of appeal unless he could obtain the certificate of the trial Judge or the certificate of the Public Prosecutor under section 34 of the Courts Ordinance.

There would seem to have been some genuine misunderstanding on the applicant's part as to his rights in this connection for which, we hasten to add, the Prisons authorities were in no way responsible. Be that as it may, however, he applied to the Public Prosecutor for a certificate, which he did not obtain, but apparently omitted to apply to the trial Judge.

In the circumstances he filed the present application in which he asked for "an order that the time to appeal to the Court of Appeal be extended and for an order that the Attorney-General be justified in issuing a certificate to the

applicant under section 34 of the Courts Ordinance, 1948".

When the matter came on before us, counsel asked leave to amend the application by substituting for the relief asked an order for extension of time within which to file the certificate under section 34 if it was obtained. We granted the application to amend and adjourned consideration of the application as amended to the next sitting of the Court at Penang.

The interpretation of section 34 of the Courts Ordinance is not altogether free from difficulty. Nevertheless, subject to anything that may be said in argument at a later stage, it seems to us that a person wishing to appeal under that section must obtain the necessary certificate and must then file it within thirty days or within such extended period as the Court of Appeal may allow. Clearly on that view this Court cannot consider any question of extension of time until it is known whether or not a certificate has been in fact obtained (or will be obtained in the event of an extension of time being granted) and it was for that reason that we adopted the course which has been described.

Order accordingly.

AZIZ BIN SHARIFF v. EASY BUS CO. & ORS.

[O.C.J. (Buttrose J.) September 12, 1958]

[Singapore — Suit No. 8 of 1957]

Damages — Personal injuries, loss and damage suffered as a result of accident — Prolonged confinement in bed — Loss of kidney — Remoteness of damage.

The plaintiff sued the defendants for damages for personal injuries, loss and damage he suffered as the result of an accident which occurred in March 1956 between the 1st defendant's bus (in which he was a passenger) driven by the 2nd defendant and the 3rd defendant's lorry driven by the 4th defendant. The 3rd and 4th defendants having admitted liability for the accident, the plaintiff's claim against the 1st and 2nd defendants were dismissed with costs payable by the 3rd and 4th defendants. The only question remaining to be determined was as to quantum of damages to which the plaintiff was entitled as against the 3rd and 4th defendants.

The plaintiff sustained a broken leg and was confined to a Hospital bed in the first instance for 5 months. The plaintiff's evidence was that after he had been in the Hospital for 3 months he felt a pain in his stomach. The pain continued intermittently until April 25, 1958 when he was operated on and his right kidney was removed as there was a stone in it. At the hearing the plaintiff applied to amend the statement of claim by adding under "Particulars of Injuries" a new paragraph: "Loss of right kidney involving a further

period of 3 months in Hospital and considerable pain and suffering." This addition of claim gave rise to the issue of remoteness of damage with regard to the loss of the kidney.

According to medical evidence the plaintiff's evidence as to pain on the right side of his abdomen some 3 to 4 months after being confined to his bed and intermittent pains thereafter until the operation was consistent with the stone formation in the kidney commencing while lying in the hospital bed from March 1956 for a period of 5 months.

Held: the plaintiff got the stone formation in his right kidney as a result of his prolonged confinement in bed at the hospital following the accident and he was therefore entitled to damages for loss of his right kidney in addition to damages for pain and suffering.

CLAIM FOR DAMAGES.

C. L. Duff for the plaintiff.

P. T. Wong for the defendants.

Cur. Adv. Vult.

Buttrose J.: — This is an action for damages for personal injuries, loss and damage suffered by the plaintiff as the result of an accident which occurred between the 1st defendant's omnibus (in which he was a passenger) driven by the 2nd defendant and the 3rd defendant's lorry driven by the 4th defendant.

At the hearing the 3rd and 4th defendants admitted liability for the accident and I ordered that the plaintiff's claim against the 1st and 2nd defendants be dismissed and that the 3rd and 4th defendants pay to the 1st and 2nd defendants :

(a) the costs of the action as between the plaintiff and the 1st and 2nd defendants; and (b) the costs as to the issues between the 1st and 2nd defendants, and the 3rd and 4th defendants.

The only remaining question to be determined is as to the quantum of damages to which the plaintiff is entitled as against the 3rd and 4th defendants.

The facts briefly are that on the 29th March, 1956 at about 12.45 p.m. the plaintiff a soldier serving in G.H.Q. Signals Regiment Far East Land Forces Singapore, was travelling as a passenger on the 1st defendant's omnibus. The omnibus was proceeding along Clementi Road in the direction of Pasir Panjang. While rounding a bend at approximately the 8½ mile stone the omnibus collided with the 3rd defendant's lorry which was travelling in the opposite direction and driven by the 4th defendant.

As a result of the collision the plaintiff sustained a broken leg and was confined to a hospital bed in the first instance for a period of 5 months.

His evidence was that after he had been

A in the hospital for 3 months he felt a pain in his stomach. He subsequently informed a doctor about it but according to the plaintiff the doctor only felt his abdomen and gave him a prescription. The pain according to the plaintiff continued intermittently until the 25th of April this year when he was operated on and his right kidney was removed as there was a stone in it.

B It was this fact which led the plaintiff to apply at the hearing to amend the statement of claim by adding after para. (1) under the heading "Particulars of Injuries" on page 2 thereof a new paragraph (2) as follows:—

C "(2) Loss of right kidney involving a further period of 3 months in hospital and considerable pain and suffering."

No objection was taken to the application and I allowed the amendment.

D The issue which immediately arises is that of the remoteness of damage with regard to the loss of the kidney.

E Now Colonel Jackson, F.R.C.S. of the British Military Hospital who performed the operation said that the stone was sufficiently large to preclude any possibility of removing the stone without the kidney. All the medical witnesses were agreed that a stone-formation in the kidney was a well known clinical condition following a period of recumbency and comparable according to Dr. O'Sullivan to pneumonia.

F In the opinion of Dr. Wilson the plaintiff a young man of 23 years confined to bed for 5 months as a result of the accident would in all probability get a stone formation in his kidney and as in this case his leg was broken and little or no movement possible there was very little that could be done about it.

G According to Dr. O'Sullivan the plaintiff's evidence as to pain on the right side of his abdomen some 3 to 4 months after being confined to his bed and intermittent pains thereafter until the operation in April 1958 was consistent with the stone formation in the kidney commencing while lying in the hospital bed from H March 1956 for a period of 5 months.

I The plaintiff's evidence was that right up until the accident he had always been in good health and had never complained of or experienced any abdominal pains before. The first time they ever occurred was, he said, some 3 to 4 months after the accident while he was lying in bed in the hospital.

I do not propose to refer to the evidence in any further detail except to say that I am not unmindful with regard to this aspect of the case of Dr. O'Sullivan's evidence as to what

according to his opinion was the plaintiff's ability to move while in bed and the plaintiff's own evidence on the subject.

It will be sufficient if I say that after a careful consideration of the evidence I am satisfied on the balance of probabilities that the plaintiff got the stone formation in his right kidney as the result of his prolonged confinement in bed at the British Military Hospital following the accident.

I am also satisfied that the loss of the kidney was directly traceable to the accident caused by the negligence of the 3rd and 4th defendants which resulted in the plaintiff's injuries and his confinement to a hospital bed for 5 months. As I understood it Mr. Wong for the 3rd and 4th defendants accepted this position in the light of my finding of fact as to how the disease of the kidney arose.

Now the special damages to which the plaintiff is entitled have been agreed at \$200.

With regard to general damages what I have to consider is the pain and suffering which the plaintiff has undergone, his loss of future earnings and any disadvantages arising from the disablement apart from loss of earning power.

The accident took place on the 29th March, 1956. The plaintiff's injuries were :

(a) Compound comminuted fracture of the left tibia; (b) Loss of right kidney.

As a result of the fracture of the leg the plaintiff was confined to a hospital bed for 5 months and to use his own words the pain was very severe at the beginning but it gradually subsided.

When he was allowed to get up the plaster was removed and a new one applied and he used a wheel chair. A month later the 2nd plaster was removed and an iron bar was attached to his leg and shortly afterwards he was sent back to his unit and given a pair of crutches which he used for some 2 to 3 months.

In January 1957 he again returned to hospital where he remained until finally discharged on 6th March, 1957—a period of one year after the accident.

According to the evidence of Dr. Wilson it was a very bad and most dangerous form of fracture and there can be no doubt that the plaintiff must have suffered considerable pain and was rendered immobile for a long time. For at least one year he must have experienced considerable discomfort and hardship.

As a result of the fracture there is a one-

inch shortening of the left leg and according to Dr. Wilson the plaintiff has a permanent disability of about 10% in respect thereof.

With regard to the removal of the kidney (which involved a further period of 3 months in hospital) this also must have been accompanied by considerable pain and the plaintiff's own evidence was that throughout the period from some 3 months after the accident until the 25th April this year he suffered intermittent pain on the right side of his stomach.

According to Dr. Wilson the plaintiff has a permanent disability of about 25% in respect thereof.

I turn now to consider the disadvantages which the plaintiff may incur arising from the disablement which he has suffered.

The plaintiff is a young man aged 23 years at the time of the accident and was a Lance Corporal Signaller in H.M. Forces. Following the decision of an Army Medical Board he was discharged from the Army as unfit for military service owing to the loss of his right kidney.

The plaintiff is, in my view, by no means precluded from indulging in most forms of sport with the exception of football. There is no reason why, according to the medical evidence, he should not be able to swim and play badminton and squash.

Despite the serious nature of the accident the movements of all the plaintiff's joints are good in the affected area including knee and ankle joints and with continued exercise the position will still further be improved. His health will in no way be affected by the removal of the kidney and according to the evidence of Dr. O'Sullivan it would not prevent the plaintiff from leading a normal life.

One must however bear in mind the psychological factor. The removal of one kidney must necessarily create an ever present feeling of apprehension with regard to the remaining one. The plaintiff now has only one kidney and one is essential for life. While the evidence, in my view, has clearly established that the plaintiff will suffer no handicap while his remaining kidney remains healthy injury or disease of it would be a most serious matter. Its loss would, and its serious impairment might, result in death.

Taking all these various factors and circumstances into consideration I have arrived at the conclusion that the proper award with regard to pain and suffering and the disadvantages arising from disablement is \$13,500 of which \$6,500 is

attributable to the leg injury and \$7,000 to the loss of the kidney. A

This leaves the question of loss of future earnings still to be determined and I find this a difficult matter to assess.

At the date of the accident the plaintiff was drawing \$161 as a Lance Corporal which included pay and allowances. His evidence was that he had signed on for a period of 10 years of which he had served 4 at the time of the accident. B

According to Major Stewart his Commanding Officer the plaintiff had prospects of promotion in due course of time, first to Corporal and then to Sergeant. The plaintiff's army career is now closed to him but according to his evidence he had no intention of continuing on after the completion of his 10 year period of service. His intention was to try and obtain employment with the Telephone Board in view of the experience gained while in the Army. C

The plaintiff's present position is that he is unemployed. He has made two unsuccessful attempts to obtain employment one as a store-keeper and the other as a bus conductor with the Singapore Traction Coy. D

While the plaintiff's general experience would appear to be somewhat limited there is no reason why he should not be able to lead a perfectly normal existence and although no doubt employment difficulties do exist at the present time he should if he perseveres obtain satisfactory employment if he will but put his mind to it and set about it with a will. E

The termination of the present litigation should go a long way towards restoring a brighter and more normal outlook. F

It is true he may for some time have to be content with earning less than he was getting but there is no reason to suppose that he will not eventually approximate to or even exceed it. G

Giving the best consideration I can to the problem I am of opinion that an award of \$2,500 would in the circumstances be justified. H

In the result therefore I assess the general damages to which, in my view, the plaintiff is entitled at \$16,000 which together with the agreed special damages of \$200 makes a total of \$16,200. I

There must be judgment, therefore, for the plaintiff against the 3rd and 4th defendants for the sum of \$16,200 and costs.

Judgment for the plaintiff.

Solicitors : Donaldson & Burkinshaw;
Oehlers & Choa.

In re S. A. A. ALSAGOFF, DECD.;
SYED ZAKARIA ALSAGOFF & ORS. v.
R. D. STEWART & ORS.

[O.C.J. (Whyatt C.J.) May 2, 1958]

[Singapore — Suit No. 1027 of 1956]

Wills and Trusts — One will annexed to and forming part of the other — Principles of construction — To be read together to discover testator's intention — Former construction entirely based on unilateral consideration of one will — Other will not produced before nor considered by Court — Effect of former adjudication.

Practice and Procedure — Judgment — Setting aside — Jurisdiction of Court to set aside earlier judgment adversely affecting parties.

Syed Ahmad bin Abdulrahman Alsagoff died on March 27, 1875 leaving two testamentary dispositions, an English will dated December 30, 1868 and an Arabic will dated December 20, 1868, which was annexed to and formed part of the English will; both the wills were admitted to probate. In the events that have happened, the residuary estate is distributable in 1961. In 1918, Woodward J. on a construction of both the wills read together, decided in *Syed Ali bin Mohamed Alsagoff v. Syed Omar bin Mohamed Alsagoff*⁽¹⁾ "the residue of the income from the landed property after certain payments enumerated in the will, is to be distributed every year among those who are entitled to it according to Mohamedan law, the share of every male to be twice as much as the share of every female, of his (the testator's) lineage", the intention being that "descendants" should include "the remotest generation coming into being during the prescribed period and that on the death of the parent each succeeding generation should take, *per stirpes*, a life interest in the income till the time of distribution."

On the death of Shariffa Bahia, a life-tenant, who left 2 daughters, Shariffa Shekka and Sheriffa Aisha and seven grandchildren, being the children of her predeceased son Syed Ahmad, an Originating Summons was taken out in 1941 by the then trustees of the testator's will for the construction of the English will. No reference was made to the Arabic will. It was held by McElwaine C.J., on the construction of the English will, that the income was divisible among the 2 daughters and the grandchildren in equal shares. Some of the grandchildren were then infants. The present proceedings were commenced in 1956 by three of them (who were still infants) to set aside the order on the ground of various irregularities and, in particular, it was contended that the judgment pronounced in 1942 was given *per incuriam* because the Arabic will, which was highly relevant, was not produced before nor considered by the learned Chief Justice. They contended that, as a matter of pure construction and the cumulative effect of both the wills, the grandchildren, among themselves, were entitled to one-half and the children of the two daughters (who had died in the meantime) to one-quarter share each of the income formerly paid to Shariffa Bahia.

Held: on a proper construction of the two wills, it made no difference to the distribution of the income